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In the

Supreme Court of the United States

OCTOBER TERM, 1963 1964

No. [redacted] 103

TWENTIETH CENTURY-FOX FILM CORPORATION, et al.,

Petitioners,

—against—

SAMUEL GOLDWYN, et al., doing business as GOLDWYN PRODUCTIONS, a limited partnership, successors in interest to the plaintiff Samuel Goldwyn Productions, Inc.,

Respondents.

PETITIONERS' REPLY TO BRIEF IN OPPOSITION TO CERTIORARI

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STATUTES

Section 5 of the Clayton Act, 38 Stat. 731, 15 United States Code Section 16 4

IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

TWENTIETH CENTURY-FOX FILM CORPORATION, FOX WEST COAST THEATRES CORPORATION, FOX WEST COAST AGENCY CORPORATION and NATIONAL THEATRES CORPORATION, *Petitioners,* *—against—* SAMUEL GOLDWYN, FRANCIS HOWARD GOLDWYN, SAMUEL GOLDWYN, JR., JAMES A. MULVEY, and BEN FISH, doing business as GOLDWYN PRODUCTIONS, a limited partnership, successors in interest to the plaintiff Samuel Goldwyn Productions Inc., *Respondents*	No. 1135

PETITIONERS' REPLY TO BRIEF IN OPPOSITION TO CERTIORARI

Statement

Respondent's brief in opposition to the petition for a writ of certiorari advances no valid reason why the writ should not issue. Although the decision of the Ninth Circuit below is, as we have shown, in conflict with decisions of other circuits, respondents* would overcome the question of conflict among the

*Respondents were not plaintiffs in the District Court. A Goldwyn-controlled and dominated company, Samuel Goldwyn Productions, Inc., as the producer of some of the pictures involved and as purported assignee of other Goldwyn companies which produced others of such pictures, was the plaintiff. Respondents, therefore, are generally referred to as Goldwyn, Mr. Goldwyn himself being the first named of the respondents.

circuits by the bland assertion that none exists. These conflicts, which are real and deep, can not be disposed of by evasion. Yet that is all respondents offer. Otherwise, Goldwyn's opposition to the petition reduces itself to three main propositions.

The first is that the plaintiff below was not really a participant in and beneficiary of the *Paramount* case conspiracy because such plaintiff, Samuel Goldwyn Productions, Inc., was not itself a party to the *Paramount* case. The point is raised for the first time that some meaningful distinction exists between Mr. Goldwyn and the corporations which he admittedly had organized, dominated and controlled. There is no merit to this contention. In addition, it is a fact that the Goldwyn pictures were treated by the Government as having been utilized as a part of and as the beneficiaries of the conspiracy complained of. Moreover, by definition, both Mr. Goldwyn and his companies were excluded from the class of "independents", for whose benefit the Government case was instituted.

The second proposition is that Mr. Goldwyn not only was not a participant in or beneficiary of the conspiracy found in *Paramount* but that he "aided and assisted" the Government. This assertion is without merit and deserves but little consideration.

The third proposition is that Goldwyn is not precluded from recovering, even though he was a participant in and beneficiary of the conspiracy found in the antecedent Government action, because, it is asserted, this Court has held that "pari delicto" is no defense (Br. p. 17). This is a plain misreading of the decisions of this Court in *Kiefer-Stewart Co.* v. *Seagram & Sons*, 340 U. S. 211, and *Moore* v. *Mead's Fine Bread Co.*, 340 U. S. 944 and 348 U. S. 115. Those decisions have no relevance because the facts in both cases not only were different from those present in this case but the cases are in no way contrary to the cases cited in the petition or with the

landmark decision of this Court in *Eastman Co.* v. *Southern Photo Co.*, 273 U. S. 359.

ARGUMENT

1. Goldwyn and the Goldwyn Companies Were not Independent Producers within the Meaning and Definitions of the *Paramount* Case

In its brief in opposition to the petition for certiorari Goldwyn has raised for the first time the claim that there is some controlling distinction between himself as a producer who was originally named as a defendant in the *Paramount* case and the plaintiff in the District Court, Samuel Goldwyn Productions, Inc. Throughout the trial Goldwyn, the Goldwyn pictures and the Goldwyn companies were treated as one and the same so far as the proceedings in the *Paramount* case were concerned. No contention was made below that any significance attached to the fact that it was Mr. Goldwyn who had been a party to the *Paramount* case and not the plaintiff, Samuel Goldwyn Productions, Inc.

The specious nature of the point is indicated by other admitted facts. Plaintiff itself seems not to have been in business as a producer of any pictures prior to November 11, 1946, when it entered into contract with RKO for the distribution of pictures (App. C, pp. 523-38c). It is also a fact that a majority of the Goldwyn pictures here involved were produced before that time. Further, plaintiff was but one of a number of corporations used by Goldwyn for tax purposes or otherwise. It was undisputed that Mr. Goldwyn himself was the majority stockholder who dominated and controlled not only the plaintiff corporation but the other producing companies which had assigned their purported claims to plaintiff.

In any event, the relationship between Goldwyn and his corporations is without significance here. For not only Mr. Goldwyn but also the plaintiff Samuel Goldwyn Productions,

Inc., and all the other Goldwyn companies were excluded from the status of "independent producer" by the precise definitions contained in the *Paramount* case petition and amended complaint. It takes no subtleties of reasoning, as respondents attempt, to equate Mr. Goldwyn with Samuel Goldwyn Productions, Inc., so far as Section 5 of the Clayton Act, 38 Stat. 731, 15 United States Code, Section 16, is concerned. Neither was an independent in the sense that the plaintiff in the *Eagle Lion* case,* for example, was an independent. Goldwyn and all the Goldwyn companies produced "motion pictures for release by a major distributor pursuant to a prior understanding or agreement with such major distributor". A major distributor was "a distributor which is a defendant herein or is controlled by a defendant herein" (*Paramount* case definition in paragraphs 15(b) and 16(b) of the amended complaint. App. C., pp. 165-66c). Plainly, by definition, the Government complaint treated all producers such as Goldwyn as affiliated with the major distributors and defendants in *Paramount*. It is not what Mr. Goldwyn himself says he was but what the Government alleged in its complaint he was—as well as his companies—that is determinative under Section 5 of the Clayton Act. Goldwyn was therefore excluded by definition from the class of independents which he now seeks to embrace.

In addition, regardless of whether Mr. Goldwyn and his companies are treated separately or collectively, it is undeniable that the *Goldwyn pictures*, by whoever produced, were regarded

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**Eagle Lion Studios* v. *Loew's Inc.*, 141 F. Supp. 658 (S. D. N. Y., 1956) affirmed, 248 F. 2d 438 (2nd Cir. 1957), affirmed, 358 U. S. 100. The decision of the Ninth Circuit is in direct conflict with that of the Second Circuit in *Eagle Lion* in that an admitted and conceded "independent" there was not allowed the benefits of Section 5 of the Clayton Act because nothing in that case was "distinctly put in issue and directly determined" in *Paramount*. In the case at bar an affiliated, major producer, by definition, seems to be accorded the benefits of Section 5 under the decision of the Court below. The *Eagle Lion* case is discussed in the petition at pages 36-39.

by the Government as forming an integral part of the distribution practices complained of and as being the beneficiaries of those practices.

The disclaimer of control over United Artists Corporation and RKO Radio Pictures, Inc., is an irrelevant fact, if fact it be (Br. p. 4). Petitioners have never asserted that Mr. Goldwyn was more than an equal (that is, one-fifth) owner of United Artists or that he exercised dominion and control over RKO. The important consideration is that Mr. Goldwyn retained absolute control over the sales policies and distribution practices relating to his own pictures, whether released by United Artists or RKO (petition, p. 47). The Government, of course, relied upon the Goldwyn pictures and the distribution practices concerning them to prove its charges.

There is understandably no record citation for the claim that plaintiff "produced films, and by force of economic necessity, distributed them through RKO Radio Pictures, Inc." (Br. p. 3). There is not a scrap of evidence to that effect in the record. Indeed, there was no evidence whatever that Goldwyn was in any way dissatisfied with the efforts of United Artists or RKO in the distribution of his pictures.

2. The Government Received No Aid or Assistance from Goldwyn in Its Prosecution of the *Paramount* Case

Whatever significance such a contention might have here, it is really too much for Mr. Goldwyn to say that he "aided and assisted the Government in the prosecution of the *Paramount* case" (Br. p. 10). It is apparently a fact that in August, 1943, Mr. Mulvey of the Goldwyn organization met with Assistant Attorney General Clark of the anti-trust division (App. C. 515-521c). Mr. Mulvey's inter-office memorandum to Mr. Goldwyn, however, merely outlines complaints against three affiliates of Paramount Pictures Inc., two large

non-affiliated circuits and independent exhibitors. There is nothing in that communication about the defendants here. Whatever the nature of the meeting, Mr. Goldwyn's assistance or aid was not availed of by the Government at the trial in the fall of 1945, when Mr. Justice Clark was Attorney General.

And, for whatever reason Mr. Mulvey made his visit to the Department of Justice, it can not be gainsaid that the visit was made long after the petition and amended and supplemental complaint in *Paramount* were filed. Following that visit and whatever else may have transpired, including the *amicus* brief filed by the Society of Independent Motion Picture Producers concerning the relief to be granted in *Paramount*, the Government never at any time sought to amend its complaint to withdraw any of the definitions which by their terms precluded both Goldwyn and the Goldwyn companies from any class of "independents" for whose benefit the *Paramount* case was instituted. As we know, the case proceeded to trial with the Government relying in large part upon practices involving the distribution of the pictures produced by Mr. Goldwyn or his companies as proof of its charges of discrimination against independents. Whether Mr. Goldwyn, in effect, wanted to turn "state's evidence" is of no moment. The charges against him and his class of producers were never withdrawn.

3. As a Participant in and Beneficiary of the Conspiracy Found in the *Paramount* Case Goldwyn May Not Recover Against the Petitioners Here

Goldwyn cites two decisions by this Court in 1951 as the reason why this action may be maintained against the defendants, even though Goldwyn was a participant in and beneficiary of the *Paramount* case conspiracy. *Kiefer-Stewart Co.* v. *Seagram & Sons*, 340 U. S. 211, and *Moore* v. *Mead's*

Service Co., 340 U. S. 944. In referring to those cases, Goldwyn says that this Court "has repeatedly held that 'pari delicto' or 'unclean hands' is no defense" to an action for treble damages (Br. p. 17). As this Court will readily see, this is reading entirely too much into those decisions. Both of them are different from the case at bar.

In this case, as we have seen, Goldwyn and his companies were by definition affiliated with the defendants in the *Paramount* case, both being excluded by the definitions of the petition and amended complaint from any class of "independents". The pictures produced by Goldwyn were always distributed through a *Paramount* case defendant. It was the same conspiracy charged in *Paramount* with which Mr. Goldwyn, his companies and his pictures were involved. If the Goldwyn-produced pictures were utilized, or were charged by the Government as having been utilized, as part of this conspiracy to discriminate against independents, Goldwyn was as much a part of the conspiracy charged and found in *Paramount* as were his agents RKO and United Artists. We know, of course, that there were many such instances, as noted in the petition at pages 12-18 and more fully in Appendices B and C. We also know that Goldwyn and his pictures were pointed to by the Government in *Paramount* as the beneficiaries of the practices complained of in that case.

The differences between the case at bar and *Kiefer-Stewart* are apparent. There the defendants Seagram and Calvert, affiliated companies, refused to sell to Kiefer-Stewart because it refused to maintain *maximum resale prices*. This Court held, as it has done from the earliest days, that any attempt to set or maintain prices of any sort was a *per se* violation of the anti-trust laws. Concerning that, this Court said (p. 213):

> ". . . We reaffirm what we said in *United States* v. *Socony-Vacuum Oil Co.*, 310 U. S. 150, 223: 'Under the Sherman Act a combination formed for the purpose

> and with the effect of raising, depressing, fixing, pegging, or stabilizing the price of a commodity in interstate or foreign commerce is illegal *per se*.'"

It was no defense, therefore, that Kiefer-Stewart and others were parties to another and separate agreement to maintain *minimum resale prices*. The conspiracy among plaintiff and others to sell at higher prices could not have injured the manufacturers, that is, distillers, if their sales were not diminished thereby, since they still received the manufacturer's prices. It was the buying public which was injured by Kiefer-Stewart and its co-conspirators. It was the Government's responsibility to bring an action against them. Such unlawful conduct, however, did not make lawful the agreement between Seagram and Calvert to hold the line on maximum resale prices.

In *Moore* v. *Mead's Service Co.*, 340 U. S. 944, the case was sent back for further consideration in the light of the *Kiefer-Stewart* decision. When the case returned to this Court as *Moore* v. *Mead's Fine Bread Co.*, 348 U. S. 115, there was no element in the decision of this Court relating to participation or acquiescence in an unlawful boycott by Moore against Mead. The case turned upon violation by Mead of Section 2(a) of the Clayton Act and Section 3 of the Robinson-Patman Act. This Court held that the price cutting and underselling by Mead was for the purpose of destroying a local business and to obtain an unlawful competitive advantage. Such conduct violated the statutes set out above.

There is no indication in either *Kiefer-Stewart* or *Mead's Fine Bread* that the traditional view expressed in the cases referred to in the petition at pages 47-54 is not the correct view—that is—that a participant in, and beneficiary of a conspiracy may not recover against his co-participants and conspirators. Indeed, in one of the most important anti-trust decisions ever rendered, this Court expressly approved an instruction by the District Court that plaintiff could not recover if it were *in pari*

delicto with defendant. *Eastman Co.* v. *Southern Photo Co.*, 273 U. S. 359. In that case, this Court said (pp. 376-78):

> "The defendant—while conceding that the loss of anticipated profits from the destruction or interruption of an established business may be recovered where the amount of the loss is made reasonably certain by competent proof, *Central Coal & Coke Co.* v. *Hartman* (C. C. A.), 111 Fed. 96, 98—contends that there was a lack of competent proof of such damages in that the profits earned by the plaintiff during the preceding four years in which it had been a customer of the defendant, were improperly used as a standard by which to measure the damages sustained by the plaintiff during the period covered by the suit, since during such preceding years it had participated in the defendant's unlawful acts in furtherance of the monopoly and was *in pari delicto*.
>
> "There was, as stated by the Court of Appeals, evidence from which the jury could justly reach the conclusion that the plaintiff was not a party to the monopoly *in pari delicto* with the defendant, and that the plaintiff had complied with the defendant's restricted terms of sale merely for the reason that otherwise it could not purchase or secure the goods necessary in the conduct of its business. There was also affirmative evidence, not contradicted, tending to show that under the defendant's restricted terms of sale the dealers' profits did not exceed those on the sale of goods of other manufacturers not parties to the monopoly.
>
> "The jury was instructed, in substance, that if, during the preceding period in which the plaintiff had been a customer of the defendant, it had not merely bought goods from the defendant because of a business necessity, but, with a knowledge of the defendant's purpose to monopolize, had knowingly and willfully helped to build up the monopoly, it was *in pari delicto*, and hence could not recover any damages whatever on account of the defendant's refusal to continue to sell it

goods; and, further, that even if the plaintiff had not been a party to the monopoly, it could not recover damages on the basis of the profits which it had earned while a customer of the defendant to the extent that they had been increased by the monopoly and exceeded those in a normal business, but that they must be reduced to the basis of normal profits.

"We find, under the circumstances of this case, nothing in these instructions of which the defendant may justly complain. See *Ramsay Co.* v. *Bill Posters Assn.*, 260 U. S. 501, 512. The statement in *Victor Talking Mach. Co.* v. *Kemeny* (C. C. A.), 271 Fed. 810, 819, on which the defendant relies was based on the assumptions that the plaintiff had not only been a party to the unlawful combination, but that his earlier profits had exceeded those which "he could earn lawfully in a competitive market." And in *Eastman Kodak Co.* v. *Blackmore* (C. C. A.), 277 Fed. 694, 699, the substance of the holding was that the profits made by the plaintiff during an earlier period ending in 1902, in which he had actively participated in the unlawful combination, could not be set up as the standard of the profits which he would have realized in a much later period commencing in 1908."

In the thirty-seven years since the decision in *Eastman* was rendered, this Court has never had occasion to question its validity.

None of the lower courts, moreover, appears to have accepted the extreme view here advocated by Goldwyn. In *Pennsylvania Water & P. Co.* v. *Consolidated G. E. L. & P. Co.*, 209 F. 2d 131, *cert. den.* 347 U. S. 960, the Fourth Circuit (Circuit Judges Parker, Soper and Dobie) had before it a contention by the plaintiff that it had suffered damages as a result of defendant's violation of the anti-trust laws. The District Court held that plaintiff was *in pari delicto* with defendant and, therefore, could not recover. The appeal was

heard after the decision of this Court in the *Kiefer-Stewart* case. The differences between the parties grew out of a contract between them dated June 1, 1931. That agreement was subsequently declared to be in violation of the anti-trust laws. 186 F. 2d 934 (4th Cir. 1951). On the appeal in that action plaintiff contended that the doctrine of *in pari delicto* was no longer a defense to a private action for damages growing out of an anti-trust violation. Plaintiff relied principally upon the decisions of this Court in *Kiefer-Stewart* and *Mead's Service Co.* In declining to follow plaintiff's contention and holding that it could not recover, the court (Circuit Judge Soper) said (pp. 133-134):

> "We do not so understand these decisions, for in none of them were the plaintiff and the defendant parties to the same illegal conspiracy or agreement on which the suit was based. * * * There is no parallel with the situation in the case at bar in which the plaintiff and defendant were parties to the same illegal conspiracy.
>
> "In Kiefer-Stewart Co. v. Joseph E. Seagram & Sons, Inc., a wholesaler of liquor brought suit under the anti-trust acts against certain distillers who had conspired to sell liquor to wholesalers only on the condition that they would resell at prices fixed by the distillers. It was held that this agreement violated the anti-trust statutes, and that it was no defense to the suit that the wholesalers had entered into an agreement with other wholesalers to set a minimum price at which the liquor sold by them should be resold by the retailers. The court said that if the wholesalers were themselves guilty of infractions of the law, they could be held responsible therefor, but that this conduct did not legalize the unlawful combination of the distillers.
>
> "In Moore v. Mead Service Co. a baker brought suit against others in a similar business who had entered into an illegal agreement to reduce the price of their bread in the city in which the plaintiff's bakery

was located but at no other place where they sold their products. This agreement was made to offset a previous agreement between the plaintiff and certain retailers of bread in the city in which they agreed to buy only from him. It was held by the lower courts that both of these agreements were illegal and since the plaintiff himself was a party to the last mentioned agreement he could not recover from the defendants. This decision was reversed by the Supreme Court on the authority of the decision in Kiefer-Stewart Co. v. Joseph E. Seagram & Sons, Inc., and it was subsequently determined that the plaintiff was entitled to recover from the defendants. Here again the plaintiff was not a party to the illegal agreement which formed the basis of his suit, and hence the situation does not parallel that in the pending suit.

"We are satisfied that it was not the intention of the Supreme Court to overrule the doctrine firmly established in earlier cases. Consequently it must be given effect in this action."

In accord with the interpretation of the decisions in *Kiefer-Stewart* and *Mead's Service Co.* by the Fourth Circuit in the *Pennsylvania Water* case are the following decisions by the District Court: *H. & A. Selmer, Inc.* v. *Musical Instrument Exchange,* 154 F. Supp. 697 (S. D. N. Y. 1957); *Kentucky Rural Elec. Coop. Corp.* v. *Moloney Elec. Co.,* 175 F. Supp. 250 (W. D. Ky. 1959) and *Kershaw* v. *Kershaw Manufacturing Company,* 209 F. Supp. 447 (M. D. Ala. 1962). As Judge Soper concluded in the *Pennsylvania Water* case, this Court in *Kiefer-Stewart* did not overrule the doctrine firmly established in the earlier cases cited in the petition.

CONCLUSION

For all the reasons stated in the petition and in this reply brief, we respectfully submit that this Court should grant the petition and issue a writ of certiorari to the United States Court

of Appeals for the Ninth Circuit to review and settle the questions here presented.

Respectfully submitted,

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